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Compensation for Wrong Verdicts

IT would be idle to argue that confidence in the system of trial by jury remains unimpaired by the wrong conclusions which juries have been proved to have reached in a number of recent cases. Probably we must accept it as the best method available, the human material being what it is, for it is difficult to think of any better. It follows that sensible provision should be made for the damage that may be done by verdicts against innocent persons. Public opinion was clearly outraged by a recent award of £400, £300 and £300 to three men who served sentences of two years' imprisonment for offences which they had not committed. Many who expressed views objected, rightly enough, to the term "free pardon." As Mr. R. C. H. BRIGGS wrote in *The Times* of 20th January, the commission of inquiry into the case of Adolf Beck (of which the chairman was the then Master of the Rolls) concluded its report, published in 1904, with a suggestion that the anomaly of pardoning a man who ought never to have been convicted should be abolished. "It is also surely time," he added, "that the compensation paid to persons wrongly imprisoned by the State bore some resemblance to the damages which would be recovered in a successful civil action for false imprisonment." The HOME SECRETARY said in the Commons on 24th January that the amounts awarded in the recent cases were generous. This may be right in the special circumstances of those cases, but the principle laid down in 1904 retains its validity today.

Smithfield

RATHER more has been read by the Press and public into the decision of His Honour Judge BLOCK at the Mayor's and City of London Court in the case of *Durrant* v. *Smithfield and Argentine Meat Co., Ltd.*, than the decision warrants. It seems to be assumed that the bummerees (the spelling is to some extent a matter of taste) have been defying the authority of the law. In fact, no bummeree was a party to the action nor to the contract between Durrant (a butcher) and the company who supplied him. The court held that Durrant was entitled, as between himself and the company, to delivery up to himself or his employees of all meat purchased by him from the company as soon as the property in it passed to him, and, secondly, that he was entitled, again as between himself and the company, either by himself or his employees, to remove meat purchased by him from the company's premises. The company could have protected themselves by including a clause in the contract to the effect that the meat was to be removed only by bummerees. So far as we

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can see, the bummerees, not being parties to the contract between Durrant and the company, cannot have broken it, nor have they broken any term of any contract into which they may have entered themselves. They did not induce either Durrant or the company to break their contract. Likewise, so far as we are aware, they have not contravened the byelaws made by the Corporation of London, which merely provide that meat shall be carried only by licensed porters or by purchasers and their employees but which do not confer any absolute right on purchasers. Solicitors do not insist that litigants must be represented but only that if they do not appear in person they shall be represented by solicitors. While, therefore, we may presume on the strength of this to criticise, to deplore, and even to condemn those who seek to preserve their interests by preventing others from doing work which those others could do for themselves, we need not join in the chorus which is denouncing the bummerees as lawbreakers.

Probate Practice: Grants to Nominees of Non-Trust Corporations

RULE 34 (3) of the Non-Contentious Probate Rules, 1954, requires that on application for a grant of representation to the nominee of a corporation (not being a trust corporation) a copy of the resolution appointing the nominee, sealed by the corporation or otherwise authenticated to the Registrar's satisfaction, must be lodged. A Practice Direction issued on 2nd January by the Senior Registrar to the staffs of the Principal and District Probate Registries now provides that before a grant can be made under r. 34 (3) to the nominee of a non-trust corporation *entitled as executor* it must be established that the corporation has power under its constitution to take a grant through its nominee. This will normally be evidenced by the production of a copy of the constitution. The Direction adds that a corporation or association or public or charitable or private body of persons *entitled as beneficiary or creditor* need be required only to provide its nominee with a copy (authenticated in accordance with the rule) of a resolution passed by the committee or other body most completely representing it.

Exchequer Equalisation Grant: Estimated Payments for 1956-57

LOCAL authorities in England and Wales that receive Exchequer equalisation grant have been notified by the Ministry of Housing and Local Government of the estimated amounts payable to them for the year 1956–57. A written announcement by the Ministry on 19th January, 1956, contains a table of the amounts, together with the corresponding estimates for 1955–56 for comparison. The grant is paid to county and county borough councils whose rateable values per head of weighted population are below the average for England and Wales. The Exchequer in effect pays rates on the deficiency in rateable value, thus bringing each receiving area up to the average. The estimates are based on the new valuation lists. They are necessarily approximate at this stage, because the full information required to calculate the grants exactly is not yet available. The table brings out the changes in the distribution of equalisation grant due to the revaluation. Eight county boroughs, Birmingham, Coventry, Darlington, Derby, Great Yarmouth, Ipswich, Leicester and Worcester, and two counties, Buckinghamshire and Hertfordshire (who qualify for a small grant on a later estimate for 1955–56), now cease to qualify. On the other hand, six county boroughs, Doncaster, Huddersfield, Leeds, Liverpool, Norwich and Wallasey, will now receive grant for the first time. The effect of revaluation is that slightly more, rather than less, equalisation grant will be paid. The figure for England and Wales as a whole is £71,345,369 as against £67,548,961 estimated for 1955–56.

Shortage of Typists

NOT long ago we had occasion to refer to a judicial comment on the quality of secretarial work in solicitors' offices. The fault, indeed, sometimes lies, not in ourselves, but in our secretaries, but the final blame rests on ourselves for insufficient checking. The shortage, however, is not merely of good but of any typists. Mr. ASHTON NESBITT, writing in *The Times* of 19th January, criticised the wealthier companies for "scooping up" the secretaries of the smaller firms by offering salaries out of all proportion to qualifications and experience. He continued: "It has become a case of too much money chasing too few half-baked flibbertigibbets, many of indifferent education and background, often unable, in spite of a General Certificate of Education, to type, spell, or punctuate the Queen's English. Many firms are offering £9 a week and more for a five-day week, with pension rights, luncheon vouchers, canteen facilities and goodness knows what." Another correspondent, in *The Times* of 21st January, urged employers, in view of the fact that typists were not organised in a trade union and could not consolidate their present scarcity value, "to take stock of their office organisation, cut out all paper work that is not utterly necessary, and mechanise as much as they can of the rest, while there is yet time"!

War Damage Payments

ACCORDING to figures published on 17th January, the War Damage Commission paid out £27¼ million during 1955 compared with £32 million in 1954 and £38 million in 1953. The average weekly rate of payments in the last quarter of 1955 was £506,000. The Commission paid 21,000 "cost of works" claims for repairs during the year, and made 6,700 payments on account or as instalments. The amount involved was £22½ million, of which about £5 million was for the repair and rebuilding of houses. Other principal items were: commercial buildings, £5½ million; factories, £4 million; churches, £3¼ million; shops, £2¼ million. The average amount of each claim paid during 1955 was £1,070 compared with £700 in 1954 and £500 in 1953. Value payments amounted to £4½ million, of which £¾ million related to houses. Greater London's share of the total was £15½ million. Total war damage payments by the Commission now amount to £1,174 million in 4,678,000 separate payments. Contributions by property owners during and after the war amounted to nearly £200 million. Among details of amounts stated to have been paid or agreed by the Commission during 1955 and the totals paid or agreed up to 31st December, 1955, in the cases of certain non-commercial buildings it is of interest that in the case of the Temple Church the amount paid or agreed in 1955 was £39,000 and the total paid or agreed up to 31st December, 1955, was £140,000, the figures for the Inner Temple were £222,000 and £634,000, for the Middle Temple £43,000 and £147,000, for Gray's Inn £143,000 and £590,000, for St. Paul's Cathedral £13,000 and £111,000, for St. Clement Danes Church £93,000 and £93,000, and for the Sessions House, S.E.1, £128,000 and £128,000.

SECTION 34 AGREEMENTS UNDER THE TOWN AND COUNTRY PLANNING ACT, 1932

FROM time to time, a solicitor acting for a purchaser will receive back an official search in the local land charges register with an entry in Pt. III indicating the existence of an agreement under s. 34 of the Town and Country Planning Act, 1932. What does such an entry mean and what is its effect?

These s. 34 agreements were very commonly entered into in the south of England before the passing of the Town and Country Planning Act, 1947, but are less frequently encountered elsewhere in the country. The section gave power to an owner to enter into an agreement with a local authority subjecting his land "either permanently or for a specified period to conditions restricting the planning development or use thereof in any manner in which those matters might be dealt with by or under a scheme," that is, under the town planning scheme the making of which was provided for in the Act of 1932.

It may be asked what possible inducement there could be for an owner voluntarily to place his land under restrictions in this way. The answer to this is to be found in the following quotation from the judgment of the Master of the Rolls in *Ransome & Luck, Ltd.* v. *Surbiton Borough Council* [1949] 1 All E.R. 185, at p. 194: "A landowner who has hanging over his head the possibility or probability of a stringent scheme being introduced and made effective which would seriously affect the development of his land coupled with the prospect of having perhaps to oppose the scheme at great expense to himself would naturally prefer to meet his enemy at the gate and say to him 'I am prepared myself voluntarily to subject my land to certain restrictions: let us talk about it and see if we cannot agree'." At the same time many agreements were in fact entered into by landowners on the strength of a promise express or implied on the part of the local authority that development would be permitted on certain areas of land included in the agreement, and that the local authority would not object thereto.

A solicitor who obtains a copy of one of the agreements will therefore often find that besides indicating that, for example, certain areas are to be limited to use as a private or public open space, certain other areas are to be used as residential zones only, in which houses may be erected at a density of not less than x to the acre. Agreements in this form had received some sort of judicial approval in the judgment of Luxmoore, J., in the case of *A.-G.* v. *Barnes Corporation and Ranelagh Club, Ltd.* [1938] 3 All E.R. 711. This gave grounds for thinking that the consideration for such an agreement on the part of the local authority might be for the authority to debar itself from interfering after the town planning scheme came into force with the method of development specified in the agreement.

More than ten years later, however, when the 1932 Act had been repealed and the Town and Country Planning Act, 1947, had come into operation it was decided by the Court of Appeal in the case first mentioned (*Ransome & Luck, Ltd.* v. *Surbiton Borough Council*) that s. 34 only gave power to a local authority to accept restrictions offered to it by a landowner.

In so far as such an agreement purported to be permissive and not restrictive, it would therefore be *ultra vires* the authority, which could not fetter its discretion in respect of powers conferred on it under the Town and Country Planning Acts.

The first important point about any s. 34 agreement is accordingly that it is only valid in so far as it is restrictive in character and that any purported permissions for development are valueless except to the extent that they may record the view of the then planning authority that such development as was contemplated was reasonable. The real effect of s. 34 was therefore to allow a landowner to impose restrictive covenants upon his land, and to put the local authority artificially in the position of an adjoining landowner, able to enforce the restrictions as if they had been made for the benefit of adjoining land.

Position under Act of 1947

Having defined the effect of a s. 34 agreement under the law as it stood prior to the passing of the Act of 1947, we must consider how such an agreement fares under the later legislation.

The position is dealt with in Sched. X to the Act of 1947, para. 10. This basically provides that such agreements if in force on the appointed day (i.e., excepting those made for a limited period which had expired by 1st July, 1948) should continue to be enforceable. The local authority therefore which entered into the agreement can still enforce its restrictive provisions against the owner for the time being of the land affected. Whilst a s. 34 agreement may enlarge the powers of a local authority it cannot have the effect of restricting them so long as the powers are exercised in accordance with the development plan.

Enforcement of an agreement might be unreasonable to-day because planning ideas have changed. It is therefore provided that the Minister may on application discharge or modify the restriction if satisfied that the restriction on development or use is inconsistent with the proper planning or development of the area. There is also provision for the modification or rescinding of the agreement (as opposed to the restrictions) by an arbitrator.

It will be noticed that the Minister's only power is to discharge or modify the restriction. If, therefore, there was a restriction on building at a density of more than one house to the acre, the Minister could relax the provision and allow, say, eight to the acre. But if current planning policy has hardened against permitting any development at all, then the Minister cannot get rid of the agreement by order, because he would not in such a case be easing the restriction but would in fact be imposing something more stringent. Because of this limitation on the Minister's powers, it seems probable that many of these old s. 34 agreements will continue to be legally in force for many years to come, except (*a*) in cases where the person who entered into the agreement, his successors in title and the local authority terminate the agreement by consent, or (*b*) where the matter is submitted to arbitration, a procedure which does not seem to have been often, if ever, adopted. It is a pity that the Minister was not given a power to discharge or modify *the agreement*, as distinct from the restrictions imposed by it, as it is believed that nine-tenths of the agreements would by now have been cancelled as being not in accord with the development plan, and busy practitioners would have been saved some trouble.

Summary

(1) Agreements under s. 34 of the Town and Country Planning Act, 1932, are only valid in so far as they are restrictive in character. Any permissions for development purported to be conveyed thereby are valueless.

(2) The restrictions on development and use imposed can still be enforced by the local authority which entered into the agreement as though they were restrictive covenants.

(3) The agreement will not prevent the local planning authority from exercising any of its planning powers provided it acts in accordance with the provisions of its development plan. A planning permission duly granted will therefore override the agreement.

(4) The restrictions imposed by the agreement can be discharged or modified by the Minister. But there is no general power to the Minister to discharge or modify the *agreements*, however out of date the planning policies enshrined therein have become. So they may appear for years to come in the local land charges register, although for practical purposes they have ceased to be of value.

J. K. B.

Company Law and Practice

COMPULSORY PURCHASE OF DISSENTERS' SHAREHOLDINGS

SECTION 209 of the Companies Act, 1948, contains a method by which, where a scheme or contract involving the transfer of shares, or any class of shares, in one company (the transferor company) to another company (the transferee company) has, within four months after the making of the offer by the transferee company, been approved by a nine-tenths majority, the transferee company may acquire the shares of dissenting shareholders.

The section is involved, but the various steps in the procedure may be summarised as follows :—

(1) Publication of the offer.

(2) Approval within four months after the making of the offer by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already beneficially owned by the transferee company) (s. 209 (1)), unless the transferee company already holds one-tenth or more, when those approving must also be not less than three-fourths in number (s. 209 (1), proviso (*b*)).

(3) At any time within two months after the expiration of the said four months the transferee company may give notice to all or any of the dissenters that it wishes to acquire their or his shares (s. 209 (1)).

(4) When such notice is given the transferee company is entitled and bound to acquire the shares unless, within one month from the date of the notice, the dissenter appeals to the court and the court " orders otherwise " (s. 209 (1)).

(5) Where, in pursuance of such a scheme, shares are transferred so that the transferee company, or its nominees, holds nine-tenths in value of the shares in the transferor company, then the transferee company must, within one month of the date of the transfer, notify the minority in the transferor company that it holds such nine-tenths (s. 209 (2) (*a*)).

(6) Any such minority holder may, within three months from the giving of the last-mentioned notice to him, require the transferee company to acquire his shares on the same terms as the majority of the shares were acquired (s. 209 (2) (*b*)).

Despite its complications there was no English judicial authority on the construction of s. 209, or its predecessor, s. 155 of the Companies Act, 1929, in so far as the procedure on compulsory purchase was concerned, until the recent decision of Wynn Parry, J., in *Re Western Manufacturing (Reading), Ltd.* [1955] 3 All E.R. 733, where it was held that the phrase " within four months after the making of the offer," in s. 209 (1) of the Companies Act, 1948, described a maximum period within which the event contemplated, namely, the approval of the offer by the holders of not less than nine-tenths in value of the shares whose transfer was involved, might occur. It was competent to the transferee company to fix a shorter period, within the four months, during which the offer must be accepted.

The facts of the case were that the terms of a proposed amalgamation were sent out in a circular dated 11th February, 1955. The offer contained therein was conditional on its acceptance on or before 4th March, 1955, a period of twenty-one days. The offer was accepted by over 98 per cent. of the shareholders of the transferor company, but not by the applicant, whose shareholding represented ·168 per cent. of the issued share capital. The applicant claimed a declaration that a notice subsequently served on him (purporting to be a notice under s. 209) was not a notice given pursuant to a scheme or contract to which s. 209 applied, because to be within that section the offer to acquire shares must remain open for a fixed period of four months.

In reaching his decision Wynn Parry, J., considered and distinguished the Canadian case of *Rathie* v. *Montreal Trust Co. and B.C. Pulp & Paper Co.* [1954] C.L.Y. 463, where it had been held on the corresponding section of the Companies Act, 1934 (Canada), that the language of the section in the Canadian Companies Act contemplated that the offer should remain open for a period of four months. Where an offer did not comply with this requirement the offerer was not entitled to invoke the provisions of the section to compel the dissentients to transfer their shares.

Wynn Parry, J., held that the Canadian decision was based on two grounds (at p. 738) : " First, the presumed intention of Parliament to provide a sufficiently long period in which the shareholders may make investigations ; and, secondly, the view that the postponement of the right to proceed by notice against the dissenting shareholder until after the expiration of the period of four months would otherwise hardly make sense."

Each of these grounds will be considered separately.

Investigation of the offer

His lordship, although bearing in mind the view of the Privy Council in *Trimble* v. *Hill* (1879), 5 App. Cas. 342, that it is of the utmost importance that in all parts of the empire where English law prevails the interpretation of that

law by the courts should be as nearly as possible the same, decided that the tenor of English authority prevented him from holding that a dissenting shareholder in an English company could be entitled to a period of four months in which to consider the offer and to investigate its merits or demerits.

It is difficult not to feel sympathy with his lordship on this point, for the attitude of the courts to dissenters who, in the past, have asked the court to "order otherwise" under s. 209 on the merits of a scheme, or because they have not received sufficient information, has been so unsympathetic (and, sometimes, so unrealistic) that, short of some robust speeches in the House of Lords, the right to apply to the courts has, for all practical purposes, been nullified by the decisions.

The cases start with *Re Hoare & Co., Ltd.* (1933), 150 L.T. 374, where Maugham, J., held that, where nine-tenths of the shareholders in the transferor company have accepted the proposals then, *prima facie*, the offer must be taken to be a fair one, and the court will not order otherwise unless it is affirmatively established that, notwithstanding the views of a very large majority of the shareholders, the scheme is unfair.

The next case was *Re Evertite Locknuts* (1938), Ltd. [1945] 1 All E.R. 401, which turned on the information to which a member was entitled in order to decide whether or not to accept the scheme. In that case the applicant objected to the compulsory purchase of his shares on the ground that as a result of information being withheld he had not been able to judge whether to accept or to reject the offer. Vaisey, J., held that, in the absence of proof that the proposed scheme was unfair, the mere fact that a shareholder was not provided with all the materials upon which he could come to a just conclusion with regard to the proposal was not a sufficient ground for the court to interfere.

A suggestion made by Vaisey, J., in the *Evertite Locknuts* case (at p. 403), was that possibly, by appropriate proceedings against the transferor company, a dissenter could have compelled a disclosure of documents or other information sufficient to satisfy him. This suggestion found little favour with Roxburgh, J., in *Re Press Caps, Ltd.* [1948] 2 All E.R. 638, where an application by a dissenter under s. 209 for discovery was refused on the ground that, having regard to the nature of the section under which the application had been made, a dispute as to the assets of the company was not a sufficient ground for ordering discovery. At p. 629 of the report, his lordship made some observations intended to be of general application: he had "taken into account the serious consequences which might follow if the holder of 1 per cent. of the shares of a company should, in any large number of cases, become entitled by making an application under this section to obtain an extensive investigation of the company's affairs." It is submitted, with the utmost respect, that this observation grossly exaggerates the difficulties and yet ignores the distinction in principle between a shareholder obtaining information whilst continuing a member of the company, and obtaining information before deciding whether or not to consent to his interest in the company being wholly extinguished.

When the substantial issue in *Re Press Caps, Ltd.*, was tried by Vaisey, J., the dissenter succeeded, but the decision was reversed by the Court of Appeal: *Re Press Caps, Ltd.* [1949] 1 All E.R. 1913. The price contained in the offer by the transferor company had been based on stock exchange values, and the main ground of the objection was that the item of freehold property in the company's balance sheet was grossly undervalued. The Court of Appeal held that there was nothing misleading about the balance sheet figure, which did not purport to be a valuation and, moreover, a stock exchange valuation *prima facie* constituted a fair basis for a scheme.

The latest case is *Re Western Manufacturing (Reading), Ltd.*, itself where, on a point not reported in the All England Reports but reported in both *The Times* and the *Financial Times* of 30th November, 1955, Wynn Parry, J., held that the scheme was fair as 98 per cent. of the shareholders had assented and "the proof of the pudding was in the eating," an attitude which, although consistent with the authorities, virtually surrenders to the majority any discretion Parliament may have intended to confer upon the court.

The construction must make sense

In the Canadian case it had been held that, unless the offer was to remain open for four months, the postponement of the right to proceed by notice against the dissenting shareholders until after the expiration of the period of four months would hardly make sense. In disposing of this point, Wynn Parry, J., had regard, firstly, to the four other occasions where time limits are mentioned in s. 209 (see paras. (3), (4), (5) and (6) in the summary at the beginning of this article) and, secondly, to s. 209 (2) (*a*) of the Act. With regard to the second consideration, his lordship said (at p. 740): "It appears to me that the critical moment for ascertaining whether the obligation thrown on the transferee company under subs. (2) (*a*) has arisen cannot be the expiration of a fixed period, but must be that moment of time when the condition is fulfilled, namely, that as a result of a transfer of shares in the transferee company, the transferee company, taking into account shares in the transferor company already held or acquired by it, holds 90 per cent. or more of the issued share capital of the transferor company. But that is an event which may well occur so early within the four months' period first mentioned in subs. (1) that the period of one month mentioned in subs. (2) (*a*) may expire before the expiration of the four months first mentioned in subs. (1)."

It is, however, submitted that this point is no authority for the proposition it is intended to support, for it fails to take into account the distinction between the requirement of subs. (1) that holders of nine-tenths in value of the shares must have *approved* the scheme within four months, whereas the situation contemplated by subs. (2) does not arise until the shares have been *transferred*, an event which may occur before or after the expiration of the period of four months. Furthermore, there is nothing in s. 209 to preclude the operation of either subs. (2) immediately, or subs. (1) after the appropriate interval, should the transferee company have acquired the nine-tenths of the shares early in the four-month period.

His lordship concluded this part of his judgment by observing that: "It follows, therefore, that the only satisfactory way in which to construe the phrase in question in subs. (1) is as a phrase which describes a maximum period, during any moment of which the event contemplated may occur. On any view it is hardly possible to regard s. 209 of the Companies Act, 1948, as entirely satisfactory in its language. On the view which I favour, for example, it is difficult to see why the right of the transferee company to serve notice to acquire the shares of a dissentient shareholder in the transferor company is postponed until the expiration of the four months' period; but in view of the

considerations which I have discussed, it appears to me impossible to treat that postponement as decisive of the construction of the phrase 'within four months after the making of the offer' in subs. (1) of s. 209."

It is, however, submitted that there is much to be said for the Canadian view of the construction of s. 209, for, in addition to the points taken above, the report does not show that any of the following matters were taken into consideration :—

(*a*) Section 209 authorises the expropriation of private property. Any ambiguity should, it is submitted, be construed in favour of the party whose property is in peril.

(*b*) The general policy of the Companies Act, 1948, is to avoid members being rushed into hasty decisions. On the present construction of s. 209 an offer could remain open for acceptance for only twenty-four hours.

(*c*) Both the applicant and the learned judge appear to have proceeded on the basis that the offer must remain open for a fixed period of four months ; a more reasonable contention for the applicant to have put forward was that the offer was to remain open for a minimum period of four months.

(*d*) Despite the trend of judicial authority s. 209 does not contemplate that the transferee company and the majority may ride rough shod over the minority. For, by proviso (*b*) to subs. (1), where the transferee company already holds one-tenth of the shares of the transferor company the scheme must be accepted by three-fourths in number as well as nine-tenths in value of the remaining shareholders.

(*e*) Section 209 (2) recognises that the minority may not wish to continue to hold shares in the transferor company when the final result of the scheme is known. It provides, for example, for the shareholder who withholds support in the hope that the transferee company will not obtain the necessary nine-tenths support.

(*f*) There is nothing to prevent a transferor company limiting the time for acceptance of its offer providing it is content to stop there, and does not wish to invoke the compulsory purchase provisions of s. 209.

Conclusion

The provisions of s. 209 of the Companies Act, 1948, are, it is submitted, designed, firstly, to enable full control of a transferee company to be obtained in an appropriate case, and, secondly, to see that the rights of the minority are adequately protected.

On the first point, as a matter of practice, the nuisance value of a minority of 10 per cent. or less is small. Their effective opposition is limited to an application to the court under s. 210 on the grounds of oppression, or to petition for a winding up order if any of the requirements of s. 222 can be satisfied. In the exceptional case where the minority numbers exactly 10 per cent. and they are all of the same mind they may also apply to the Board of Trade for the appointment of inspectors under s. 164. It will be noticed that in all these cases the minority must first convince an outside authority, either the court or the Board of Trade, before they can succeed.

As to the second consideration, it is submitted that the current attitude of the courts to the rights of the minority under s. 209 is unsatisfactory. This may possibly be due to allowing a subconscious preoccupation with the rule in *Foss* v. *Harbottle* (1843), 2 Hare 461, to obscure the distinction between the regulation of the members' rights while the company is an independent concern, and the total extinction of a member's interest in a company in which he may wish to continue active participation.

H. N. B.

A Conveyancer's Diary

VARIATION OF TRUSTS

It would take the pen of an archangel to write a short and accurate summary of the litigation which is now usually compendiously referred to by the title *Chapman* v. *Chapman*. I do not propose to make the attempt. But, as it happens, reports of two cases in which issues which were raised in *Chapman* v. *Chapman* were again debated appeared the other day in the same Weekly Law Report, and to appreciate the results of the two cases it is absolutely necessary to remind oneself of some at least of the many facets of *Chapman* v. *Chapman*. The two cases are *Re Powell-Cotton's Resettlement* [1956] 1 W.L.R. 23, and p. 13, *ante*, and *Re Simmons* [1956] 2 W.L.R. 16, and p. 14, *ante*.

The Chapman case

So back to *Chapman* v. *Chapman*. There were originally three separate cases called, respectively, *Re Downshire Settled Estates*, *Re Chapman's Settlement Trusts*, and *Re Blackwell's Settlement Trusts*. After various fates in the courts of first instance there were appeals in each case to the Court of Appeal ; these appeals were heard together, and a single set of judgments was delivered by that court covering all three cases (see [1953] Ch. 218). The facts, grossly over-simplified, were that in each case property was held in trust for a life tenant on protective or discretionary trusts, and in each case the court was asked to sanction a scheme whereby the protective or discretionary trust could be got rid of, the persons interested thereunder being compensated for the loss of their respective interests, thus enabling the tenant for life or principal beneficiary to deal with his life interest as if he were absolutely entitled thereto. The court, it was argued, had power to sanction the arrangement in each case under two separate jurisdictions, viz., under its general equitable jurisdiction to sanction "compromises" on behalf of infants and unascertained persons, and under the statutory jurisdiction conferred by s. 64 of the Settled Land Act, 1925, or s. 57 of the Trustee Act, 1925, respectively, the first of these sections being applicable in the *Downshire* case where the settlement was a strict settlement of land, and the latter in the other two cases, where the settlements were personalty settlements.

The decision of the Court of Appeal in these three cases respectively was as follows : *Downshire* case, court had power under its general jurisdiction to approve compromises, and this was a compromise within this rule ; court further had power to approve scheme under s. 64 ; scheme therefore approved. *Chapman's* case, scheme did not constitute a compromise, so no power to approve it under that jurisdiction ; further, scheme outside s. 57, and so could not be approved

thereunder; scheme therefore not approved. *Blackwell's* case, scheme a compromise within the above principle, and approved; scheme not within s. 57, but this did not (at that stage of this litigation) matter. These results did not satisfy the tenant for life in *Chapman's* case, and he appealed to the House of Lords (see [1954] A.C. 429). This appeal was limited to the general jurisdiction of the court, and so far as this point was concerned the House held that the Chancery Division has no inherent jurisdiction to sanction on behalf of infant beneficiaries and unascertained persons any transaction which involves a rearrangement of the beneficial trusts of a settlement.

The statutory jurisdiction

As regards s. 57 of the Trustee Act and s. 64 of the Settled Land Act, therefore, so far as this kind of case is concerned, the present authority is to be found in the compendious judgments of the Court of Appeal in this litigation. It is almost superfluous to say that any case which is likely to turn on either of these sections must always involve a close consideration of the language used in them in the light of the particular facts; but for the purpose of bringing out in a broad way the distinction which has been drawn by the Court of Appeal between these two sets of provisions I will confine myself to the salient words of each. Section 57 (1) provides that "where in the management or administration of any property vested in trustees, any . . . transaction is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power . . . vested in the trustees by the trust instrument, or by law, the court may by order confer . . . the necessary power for the purpose . . ." The object of this section, said the Master of the Rolls ([1953] Ch., at p. 248), was to secure that trust property should be managed as advantageously as possible, and with that object in view to authorise specific dealings with the property which the court might have felt itself unable to sanction under its inherent jurisdiction (the reference here was to the jurisdiction to sanction actions in an emergency under the "salvage" principle); the section did not disturb the rule that the court will not re-write a trust.

The language of s. 64 is markedly different. Section 64 (1) provides that "any transaction affecting . . . the settled land which in the opinion of the court would be for the benefit of the settled land . . . or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it could have been validly effected by an absolute owner." "Transaction" is widely defined by subs. (2). One (indeed, the main one) of the objects of the scheme in the *Downshire* case (as in the others) was to mitigate the incidence of the estate duty which would have been payable on the settled property if nothing were done, and it was not difficult to conclude, as the Court of Appeal did, that the removal of this future burden was for the benefit of the persons interested under the settlement within s. 64 (1); and of this provision the Master of the Rolls said ([1953] Ch., at pp. 253–54) that the jurisdiction under s. 64 was in the judgment of the court "in some respects more ample in regard to the subject-matter to which it relates than is s. 57 of the Trustee Act, 1925." In a sentence, the jurisdiction under s. 57 is confined to administrative matters; that under s. 64 extends to beneficial trusts.

An engineered compromise

With all this in mind we can turn to *Re Powell-Cotton's Resettlement*. A strict settlement of certain freeholds and capital moneys contained a somewhat obscure and, as the trustees thought, inconveniently restrictive, investment clause. They took out a summons for the construction of the clause, and when the summons came before the master applied for leave to compromise the question of construction on the terms that a new investment clause was substituted for the old clause. The court was then asked to sanction this compromise on behalf of infants under its inherent jurisdiction. Danckwerts, J., refused to do this. His judgment is not reported (the decision was, of course, in chambers), but according to the Master of the Rolls the grounds thereof were twofold: first, he said that the "dressing up" of the case as one of compromise was quite false and did not in the least represent the true situation; and secondly, even if the court had jurisdiction, it was discretionary and he would not in the exercise of a discretion sanction this kind of proposal. On the appeal, which is the decision which is now reported, this second ground was really fatal; but as the question of jurisdiction had been fully argued, the court dealt with this aspect of the case also, and on this aspect the court also agreed with the decision below. It had been submitted on behalf of the infants that the advantage of the new clause lay not in any give and take with somebody who had other rights, but in the circumstance that if a new clause was substituted and the trustees exercised their powers under it sensibly, the trustees would benefit everybody all round. The Master of the Rolls (with whose reasons Birkett, L.J., concurred) said that, in the circumstances, he was not satisfied that "this court [could] now, in loyalty to the principles laid down [by the House of Lords] in *Chapman's* case, accept the wide significance which, for purposes of jurisdiction, [counsel] would assign to the word 'compromise.'"

Why this proposal was not advanced under s. 64 of the Settled Land Act, the applicable section since the settlement was a strict realty settlement, I cannot conceive. (It would not have succeeded if s. 57 of the Trustee Act had been the applicable section, because the proposal, although concerning an administrative provision, was not one concerning a "specific dealing" with the trust property; the power asked for was a power exercisable by way of substitution for another power for the duration of the settlement.)

The scope of s. 64

The wide scope of s. 64 can be seen in *Re Simmons*. Realty was held upon trust for sale and upon protective trusts for the settlor with remainders over. The tenant for life took out a summons asking that the trustees might be authorised under the general jurisdiction or s. 64 to give effect to a proposal whereby the trust property should, in effect, be divided, the tenant for life taking one part while the other part remained settled. The question of jurisdiction was argued in open court. Danckwerts, J., does not mention the general jurisdiction in his reported judgment. As to s. 64, he first held that by virtue of s. 28 of the Law of Property Act, 1925, and *Re Wellsted's Will Trusts* [1949] Ch. 296, s. 64 applied to a case where realty was held upon trust for sale as it applied to a case of a settlement strictly under the Settled Land Act. The remaining question was whether the proposal was within the authority conferred on the court by s. 64. The learned judge referred to the decision of the Court of Appeal in the *Downshire* case, and went on: "It is plain from the judgment of the Court of Appeal, in the consideration of a proposal in some ways resembling the present (which they authorised), that the powers conferred by s. 64 are wider than those

conferred by s. 57 of the Trustee Act, 1925, and that they may include a proposal of the present type as being a transaction within the meaning of s. 64. Accordingly, it seems to me that this is a transaction which, in the opinion of the court, may be for the benefit of the persons interested under the settlement within the meaning of subs. (1) of s. 64 . . . I therefore reach the conclusion that I have power, if I think it right, to confer on the trustees for sale the authority to carry out these proposals." The proposals were then considered and authorised.

I hope that these remarks will help to put these two recent, and *prima facie* somewhat contradictory, decisions in perspective. There is clearly a great deal of scope, despite *Chapman* v. *Chapman*, or aside from *Chapman* v. *Chapman*, in the two statutory jurisdictions, ss. 57 and 64. The latter is much wider and extends to cover rearrangements of beneficial trusts, but even the former, discreetly used, is not without utility. But proposals under either section must be very carefully handled if they are to have any chance of being authorised.

"A B C"

Landlord and Tenant Notebook

PROTECTION OF BUSINESS TENANT AT WILL

THE possible risks to which landlords of business premises are now exposed when letting intending tenants into possession during negotiations are pointed up by the case of *Wheeler* v. *Mercer* [1955] 3 W.L.R. 714; 99 SOL. J. 794, which occasioned the "Notebook" article on "Tenant at Will" on 5th November, 1955 (99 SOL. J. 754), before full reports were available. The facts were as follows.

The defendant, as tenant of business premises to which the Landlord and Tenant Act, 1927, Pt. I, applied, had, when a notice to quit expiring 29th September, 1953, was served upon her by the plaintiff, her landlord, notified a claim for a new lease under that Act (s. 5), on the ground of adherent goodwill. Negotiations appear to have been begun when proceedings were instituted and were adjourned in order that the parties might negotiate—which they did for some eighteen months, when he first demanded, and then took out a summons for, possession. The demand was made on 6th April, the summons issued on 13th April, 1955—and on 1st October, 1954, the Landlord and Tenant Act, 1954, had come into operation. The tenant's defence was that she held as a tenant at will, the tenancy being one to which the new Act applied and not determinable by less than six months' notice.

The plaintiff's contentions were (i) that the defendant had, since the expiration of the notice to quit, occupied the premises as a tenant at sufferance, to which Pt. II of the Landlord and Tenant Act, 1954, would not apply; and (ii) that even if she held, as she contended, as a tenant at will, such a tenancy was outside the scope of the enactment.

Not a tenant at sufferance

On the first point, the plaintiff's case was hardly a strong one. It is true that the reason why he had not taken proceedings before the Act came into operation was that, if he had, the defendant would have availed herself of the provision in s. 5 (13) of the Landlord and Tenant Act, 1927, entitling her to an interim order on her showing that delay in the proceedings was not due to any default on her part. It had, as Denning, L.J., observed, been quite usual for a landlord to refrain because he knew that the only result would be an interim order. But in this case it may well have affected his ultimate position, for it is the interim order which authorises the tenant to continue in possession for such time after the termination of his tenancy and on such terms as the tribunal may allow, and if such an order had been made it would have been difficult for the tenant to establish that she had held "at will." The demand for possession alone would have settled the question.

It is also true that an authority, *Leigh* v. *Dickeson* (1884), 15 Q.B.D. 60 (C.A.), was cited to support the proposition that the tenancy had been at sufferance. In so far as that case dealt with the point, it was really decided at first instance by Pollock, B. (12 Q.B.D. 194). There was a claim for use and occupation by the defendant since the expiration of a lease, and some time after that expiration negotiations had been conducted and broken down. But it so happened that the parties were tenants in common of the land, and the defence put forward was that one such could not sue the other. The learned baron came to the conclusion that the occupation which the defendant had enjoyed had been referable, not to his right as tenant in common, but to his "continuing in occupation as tenant at sufferance," and then held, on the authority of *Bayley* v. *Bradley* (1848), 5 C.B. 396, that he was liable for use and occupation accordingly. It might well be observed that the result would have been the same if the defendant had been found to hold at will, so that the conclusion of a tenancy at sufferance was not necessary. But in *Wheeler* v. *Mercer* a somewhat fine distinction was drawn: it was pointed out that in *Leigh* v. *Dickeson* the negotiations had not begun till the defendant's post-lease occupation had lasted for some time (could it not be that the commencement thereof converted any tenancy at sufferance into a tenancy at will?), whereas in *Wheeler* v. *Mercer* negotiations were under way when the tenancy came to an end. This, according to Hodson, L.J., settled the point in the defendant's favour. As Denning, L.J., put it, the tenant had stayed by mutual consent pending determination of her claim for a new lease. It does not appear to have been urged that the repeal of s. 5 of the Landlord and Tenant Act, 1927, by s. 60 of the Landlord and Tenant Act, 1954, at midnight of 30th September–1st October, 1954, might have had the effect of determining the will, consent being based on negotiations to dispose of proceedings under the latter; and I would agree that there appears to be no precedent for such a determination, consistent as the proposition may be with what is known about tenancies at will.

Creation of tenancy at will

It is no doubt clear—see "A Conveyancer's Diary" in our issue of 17th December, 1955 (99 SOL. J. 881)—that the letting into possession, pending treaty, of an intending purchaser can no longer be regarded as necessarily creating a tenancy at will: the extract from Denning, L.J.'s judgment in *Errington* v. *Errington* [1952] 1 K.B. 290 (C.A.), cited in the article referred to, shows that the effect may be that of a mere licence. But it may be disputed that this development

has disposed of authorities in which the letting of an intended *tenant* into possession has been held to make the parties landlord and tenant at will: *Hamerton* v. *Stead* (1824), 3 B. & C. 478; *Coggan* v. *Warwicker* (1852), 3 Car. & K. 40. "An occupation of premises pending the execution of a lease constitutes the relationship of landlord and tenant *at will*," it is laid down in the one; in the other, the intending tenant was held liable for ten weeks' occupation, the period during which he had been in possession before refusing to sign the counterpart. "Until the agreement was entered into, and while he was in possession on the faith of the intended agreement he was a *tenant at will* . . ."

My own suggestion, then, would be that, if a distinction is to be drawn, it would be between cases in which an intending purchaser is, and an intending tenant is, let into possession pending treaty. *Errington* v. *Errington* and kindred cases have emphasised the importance of the "*quo animo*" factor; and it may well be that what would influence a court, when it came to deciding whether there was a tenancy at will to which the Landlord and Tenant Act, 1954, Pt. II, applied, would be whether the parties had been landlord-and-tenant minded. A distinction is, I submit, likely to be drawn between such circumstances as those of *Winterbottom* v. *Ingham* (1845), 7 Q.B. 611 (intending purchaser in possession: not liable for rent), and those of *Hamerton* v. *Stead*, *supra*, and *Coggan* v. *Warwicker*, *supra*. At all events, those advising landlords of business premises should draw their clients' attention to the risks attending a letting into possession during negotiations, and might suggest that a tenancy for a term not exceeding three months from its beginning (such tenancies being excluded from Pt. II: s. 43 (3)), during which term agreement might or might not be reached on the points not settled, would meet the case.

Application of 1954 Act

It could well have been contended that, there being no negotiations, or, at all events, the defendant's faith being faith in statute law rather than in intended agreement, there was no tenancy at will in *Wheeler* v. *Mercer*. But, if there was a tenancy at will within the scope of Pt. II, there was much to be said for the landlord: s. 25, providing for notices to terminate given by landlords, can fairly be said to contemplate just two kinds of tenancies: periodic and fixed term. Subsection (3) deals with the former, stipulating that the minimum six months' notice required by subs. (2) may not expire before a notice to quit given under the agreement could expire; subs. (4), making the earliest date for "any other tenancy" the date when it would expire by effluxion of time, deals with the latter. But the court came to the conclusion that these did not cut down the earlier provisions of the section: by subs. (1) the landlord may terminate *a tenancy* to which the Part applies by notice in the prescribed form; by subs. (2) the notice (subject to subss. (3) and (4)) must be given between twelve and six months from the date of termination; and s. 69 simply defines "tenancy" as "a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease or by *a tenancy agreement* . . ." It is not easy to offer any criticism of a decision arrived at by this reasoning; but it might be suggested that (*a*) under a tenancy at will the relationship may be said to be created by agreement rather than by an agreement, and (*b*) a tenancy at will, being one for an uncertain term, is not covered by such a definition.

R. B.

HERE AND THERE

A BAD POINT

ONE of the first lessons in advocacy is not to make bad points if (by good fortune) you happen to have any good ones. It is quite extraordinary how much it antagonises the tribunal. The bad impression it makes automatically obscures or discounts your good arguments. Now, in the increasingly complex situation of the Smithfield Market porters' dispute with the retail butchers, Mr. Spencer Tribe, the market organiser for the union concerned, made a thunderingly bad point on the test case of the butcher who wanted to carry away his own meat: "The judge said he could. The butcher said he would. We said he couldn't. And he didn't." It was an admirably succinct and, it may turn out, a ringingly historic phrase, but as it rings in our ears we may well ask for whom the bell tolls. It is probably not technically a contempt of court, contemptuously though it is phrased. Translated into more seemly terms it may well be paraphrased something like this: "Whatever the legal rights of the retail butcher, the pressure group to which I belong has a sufficiently extensive influence to persuade him not to press them to the uttermost." And it is perfectly true that the members of the union would be just as much entitled to withhold their labour in Smithfield (provided they committed no breach of contract) as the butcher would be to carry off his meat in his own way in his own van. So another way of putting it would be: "Don't you cross us and we won't cross you." All the same, Mr. Tribe's point was a bad one in its provocative implications, for it takes the dispute out of the atmosphere of the rule of law and clean into the jungle of trial by intimidation where conduct is governed, not by considering the rights and wrongs of the matter, but on a naked calculation of consequences.

FOR WHOSE BENEFIT?

OF course, every adjustment of human rights is a curtailment of uncharted freedom and a necessary recognition of the existence of other human beings besides ourselves. Our whole daily life is a pattern of restrictive practices, some self-imposed, others foisted on us. Every lawyer obeys the restrictive practices in his own profession—the solicitor's monopoly of bringing work to counsel, counsel's monopoly of High Court practice, the sub-divisions of the circuit. They might be rearranged or reconstructed, but their main purpose is to prevent the inevitable civil war between citizen and citizen, which is what litigation really is, from degenerating into a mere vulgar brawl, to give it form and restraint. So it is at least conceivable that in a market there is something at least to be said for maintaining a corps of licensed porters secured in their skill and their responsibility by a monopoly of the right to move the goods dealt in. But in all monopolies the test is the public benefit. After all, the lawyers exist for their clients, not the other way about. And the markets exist for the customers as surely as a bus runs to carry passengers and not to provide jobs for the crews. Both at the hearing of the butcher's case in the Mayor's Court, and in the subsequent controversy, much play was made on the theme of the reported earnings of the "bummerees"—£25, £30, £40 a week and more, said some, not more than £15 a

week said others. Who can tell, when the payment is earned in cash, job by job, and no book-keeping? But, even at the lowest estimate, many a young lawyer must wish that his own professional organisation could do as well for him in assuring him a minimum wage. Certainly, large rewards can still be reaped in the law, but it's the devil or the Civil Service take the hindermost. Now, one must not allow envy to rear its equivocal head and ask: What business has a bummeree to earn all that money anyway? If there is work to be done and they do it promptly and properly with the special, and not generally appreciated, skill of their calling, one can think of no reason in the abstract why they should not make advantageous arrangements with the interests which they serve.

THE FATAL BY-PASS

BUT, when all is said in the abstract, one gets back to the question: In whose interest is any particular monopoly working? There is always an engaging simplicity about the attitude of monopolists. In effect, and under a few conventional trimmings, they say: "It's all right if it's my monopoly; it isn't if it's yours." Or they will appear to hold that it all depends on whether it's a union monopoly or a trade monopoly, which is precisely the right attitude if you want to promote a class war, but not otherwise. There have been various suggestions for the solution of the Smithfield trouble. One is that the Court of Common Council should reassume the direct responsibility for licensing porters in the City markets, advertise that all who wished for licences should apply at such and such a place on such and such a day. That would give all parties a fresh start. A public inquiry has also been suggested and, if both parties believe themselves to be in the right, it is hard to see how either could object to displaying their rights in public. At the public inquiry, Mr. Tribe could enlarge, if he chose, on another resounding dictum of his delivered in the Mayor's Court. Counsel: "Is your attitude summed up by: 'Whether the butcher needs an independent porter or not we are jolly well going to force him to have one'?" Answer: "A very good summing up." There may be very special Smithfield reasons to justify this attitude, but to the outsider they need some explaining. On the face of it a railway passenger might, on the same principle, be forced to employ a porter to carry his suitcase as soon as he entered Victoria Station. But, whatever the answer, the really disturbing feature is the contemptuous determination to by-pass the rule of law. If the law does not rule, the alternative is force, and to invoke force in this sort of contest is to ask for a resurgent Fascism.

RICHARD ROE.

Country Practice

AMEN

IF anyone thinks of me as efficient, let me say that I have just attempted to register a probate with a company incorporated in the Isle of Man. Needless to say, it bounced back with a polite note suggesting that I should try again. I then wrote to some Manx advocates, asking them to arrange for my grant to be re-sealed. What happened? Any efficient probate clerk knows the answer; a completely new grant is made in the Isle of Man. The Isle of Man, wrote the advocates, is not part of the United Kingdom. So there am I, put in my place (the United Kingdom) while the justiciary of a friendly power gets to work on the problem.

In my vexation, let me turn uncharitably on the system of issuing grants of representation as practised in this country. It is effete. Apart from the omission of the word "Amen" and a few other ecclesiastical trimmings, the grant is very much as it was before the Victorian do-gooders shifted the administration of probate law from the Court of Arches and Doctors Commons into the civil courts. Paper now takes the place of parchment, and an impressed seal replaces the impressive seal of the Archbishop; but you cannot get away from the ecclesiastical background.

Why is it that one can take out a grant of representation at St. Asaph's, but not in Leeds? The answer is that there is no bishop of the establishment to be found in Leeds, unless he is just visiting. There is a Bishop of Llandaff, so there is a district probate registry there; but Swansea apparently lacks both these conveniences. This is hard luck on Swansea, because district probate registrars are a most worthy set of men, and of inestimable value to people like me who are apt to make mistakes and who go and waste the registrar's time, most agreeably, in discussing how much of a home-made will is of a non-testamentary character. Bishops, too, are a most worthy set of men, but that, you might think, has nothing to do with a learned article on probate law. Well, there are exceptions, but in general you can't have a district probate registrar without a worthy C. of E. bishop looming in the background.

Look at the phrase "net personalty"—an echo from the ecclesiastical past when the parish priest would look after everything until the ecclesiastically appointed executors could take over. Everything, that is to say, except the realty which passed direct to the heirs. This ridiculous distinction, though at last omitted from grants of representation, still governs all questions of solicitors' costs on probate. If anyone disputes this assertion, allow me to take one of his probate bills to taxation; I'll soon show him. The fact is that probate practice has in some respects failed to catch up with either Jeremy Bentham or Lord Birkenhead.

As to the anachronistic document presented to company registrars, insurance companies and other bodies, words almost fail me. "Keep the will off the title" has been the theme song of all good conveyancers since 1925. But try tendering a mere photostat to a good conveyancer, and the instant response is a demand to see the original grant, just in case there is an endorsement written on it. Or again, try fobbing off a good conveyancer with a title from the widow of an intestate, and tell him to ignore the part of the grant which gives the value of the estate at £6,000. Before you know where you are, you are having to stamp the assent, execute a deed of family arrangement, and vouch for the lady being barren.

"Keep the will off the title," my left foot. The grant itself refers to the executors "named in the said will"; and what mediocre conveyancer can resist having a hasty glance to see whether they are indeed mentioned on the will? And if his hasty glance takes in a general devise to someone not even mentioned on the abstract, what then? Of course, good conveyancers never look at the will, even when the

mediocre conveyancers, running short of space, have to do their endorsements at the end of the copy will. Good old *Duce and Boots*.

In its present form, a probate is not even proof of death. (Ask any insurance company.) Why, I myself have in all innocence drawn an executor's oath with the wrong date in it; and neither the bishop in those days nor the registrar in these has any concern with the death certificate.

The solution is a complete re-casting of the Act of Probate. Here is a useful precedent:—

IN THE DISTRICT PROBATE REGISTRY OF

I certify that the person named in the photographically-copied Death Certificate died $\frac{\text{solvent}}{\text{insolvent.}}$

COPY DEATH CERTIFICATE.

His aliases and other addresses are

His personal representatives are

His will (if any) is in my custody, and may be inspected only on showing proper cause.

The Inland Revenue affidavit, with which I am not really concerned, states that his domicile is English.

This certificate is for $\frac{\text{conveyancing}}{\text{general}}$ purposes only.

I have nothing to add.

(L.S.)
Registrar.

I now await with interest the arrival of the Manx grant; if it sticks merely to the essentials, I will eagerly proclaim that the Isle of Man is *not* part of the United Kingdom, and quite right, too. If, however, there are any signs of net personalty, or persons named in the will, or any of the other evils inherent in the English grant, I must write about it, more in sorrow than in anger, to the Bishop of Sodor and Man.

"HIGHFIELD."

REVIEWS

Real Property Law. By HUGH H. V. FORBES, of the Middle Temple, Barrister-at-Law. 1955. London: The Estates Gazette, Ltd. 18s. 6d. net.

The author describes the purpose of his book in the preface. Real property, he says, is a subject studied by the law student as a necessary preliminary to tackling conveyancing, and for that purpose a fairly detailed knowledge of the subject is required; but there are other professions in which real property law must be studied although no knowledge of conveyancing is even required, as, for example, those of a surveyor or an estate agent. It is for candidates for examinations in these occupations that this account of real property law has been written. It runs to 176 pages, including an appendix of forms to illustrate the text, and despite its size it is remarkably comprehensive in a general way. The author clearly has an unusually well developed gift for lucid compression: the sections on easements and mortgages are examples of this facility. Complications of a technical character are dealt with in the only possible way, given the scope of the book—by omission; the transitional provisions relating to undivided shares, for example, are described only in so far as they affect the simplest and commonest case, that of land vested before 1926 in not more than four persons of full capacity, and a footnote directs the reader's attention to the possibility of other cases. There is no index, but that is as it should be in a short book intended to be read from end to end rather than studied chapter by chapter.

Nathan's Equity through the Cases. Third Edition. By O. R. MARSHALL, M.A. (Cantab.), Ph.D. (London), of the Inner Temple, Barrister-at-Law. 1955. London: Stevens & Sons, Ltd. £2 2s. net.

Teaching equity to the student is an uphill task. Its principles are presented by even the best books on the subject as a series of rules having apparently little connection with each other (or, the student may be tempted to add, with the realities of modern life). If the student is to do more than attempt to get these rules by heart he must somehow reach the spirit which animates them, and that cannot be done without acquiring the "feel" of a jurisdiction which, despite all the changes which the courts of equity have undergone in their history, still has something personal about it—that is to say, without reading the cases as they have been decided. As the first book specifically compiled with the object of bringing the cases to the student's knowledge, "Nathan" was warmly welcomed on its first appearance in 1939. In its present (third) edition it is still very welcome. But it is not perfect, and the criticisms which follow are intended as suggestions for improvement in the future.

The title is "equity through the cases," not "cases on equity." The method of the author and present editor is to print under an appropriate headnote judgments or extracts from judgments which illuminate the principle sought to be inculcated, and to follow this with comments. This is a sound method, provided that a due balance is struck between case and comment. Such a balance is not always apparent in this edition. For example, a new note of the editor's added to Chapter I (on the nature of an equitable interest) is little more than an excuse for an excursus on the developing law of licences to enter or remain on land. Such a subject deserves the printing of a case or two for itself; but none of the large number of recent decisions of importance on licences is so printed; such as are mentioned, are mentioned only in the comment. Given the method of the book, this is a case of the tail wagging the dog. (This note on licences is, indeed, taken by itself, very interesting. In particular, it suggests a novel explanation of the perplexing decision in the *Strathcona* case ([1926] A.C. 108), which, however, is not followed up when that case is treated more extensively in the later chapter on "Restrictive Contracts affecting Property"; here it is explained more conventionally as an offshoot of the cases on restrictive covenants affecting land on the *Tulk* v. *Moxhay* principle.)

This chapter on restrictive contracts provides another example of unbalance between case and comment. On p. 525 there is a headnote to the effect that if a restrictive covenant is to pass as an incident of land "it must not only be capable of benefiting land in the neighbourhood retained (at the date of the covenant) by the covenantee, but must also be clearly annexed to . . . that land." There follow extracts from judgments in *Rogers* v. *Hosegood* [1900] 2 Ch. 388 and *Reid* v. *Bickerstaff* [1909] 2 Ch. 305. This, of course, is only partially true, ignoring as it does the principle of enforceability evolved in the line of cases ending with *Newton Abbot Co-operative Society* v. *Williamson* [1952] Ch. 286. This omission is fully realised by the editor, who explains this alternative principle (and adumbrates the difficulty which is felt in some quarters concerning the last-mentioned case) in a footnote, some 500 words in length, on pp. 531–2. Surely the proper way to explain this principle is to include a decision (say *Miles* v. *Easter* [1933] Ch. 611) as a "case" under a headnote epitomising its result?

These are examples of faults in the structure of the present edition, and they are doubtless due to the process of accretion to which books of this kind are subject. But to explain the probable cause of the lack of assimilation between old matter and new is not to excuse it. On points of detail, the practical importance of the subject-matter is not always brought out; see, for example, the treatment of discretionary trusts (incidentally, is "*tabula in naufragio*" on p. 100 a happy description of the

provisions which these trusts make ?). There are too many notes of the " cf. *Re Snooks* " kind, an admonition which is unwelcome in a practitioner's book and should be utterly banished from students' books; a particularly obscure use of this formula appears on p. 101. And an instance of uneven treatment which must leave the reader with an erroneous impression of the law is to be found in the section in the chapter on charitable trusts dealing with trusts for the relief of poverty. The special position of these trusts in relation to the rule necessitating an element of public benefit has been emphasised repeatedly recently, and it does indeed appear in these pages in a passage from the speech of Lord Simonds in *Oppenheim's* case ([1951] A.C. 297) printed in this book—but printed in the section dealing with educational trusts. If space is needed to develop this important point, the amount of space given to the line of cases of which *Farley* v. *Westminster Bank* ([1939] A.C. 430) is the archetype on pp. 198–202 (surely excessive in a book like this for a point essentially of construction), could be reduced without harm.

But these are details, and in general the student will learn much from this book. The volume is well printed and easy to read. But the use of different types for sub-headings seems wholly haphazard; for example, on p. 87, two adjoining paragraphs are headed respectively " BENEFICIARY UNAWARE OF THE TRUSTS " and " *A trust does not fail for want of a trustee.*" These paragraphs deal with essentially similar subject-matters; why this difference in type ?

Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice. Fifteenth Edition. By BASIL ANTONY HARWOOD, M.A., of the Inner Temple, Barrister-at-Law, Master of the Supreme Court. 1955. London: Stevens & Sons, Ltd. £2 10s. net.

Notwithstanding an increase in price, *Odgers* remains extremely good value for all who must master the intricacies of civil procedure whether for examination purposes or as a means of carrying through the chores of litigation *sans peine*. Indeed, it is one of those rare books which induce in the reader the feeling that he is really going to enjoy his work when he comes to translate into practice the maxims and precepts of which he reads.

The principal point of interest in this new edition is the treatment of recent procedural reforms, particularly the invigorated summons for directions. The chapter on this stage of procedure has doubled in length since the thirteenth edition, and now covers informatively the great variety of incident capable of arising before the master. Other changes have been suitably incorporated including, where relevant, those introduced by the County Courts Act, 1955.

The result is an enlarged *Odgers*, well fitted to serve many of the needs of solicitors as well as of the tyros of the Bar, to whose forebears the original author addressed himself. But if we may emulate Oliver Twist, we should like to see the solicitors' dish piled even higher. The incomparable treatment of pleading and the conduct of the trial has never seemed to us to be matched with equivalent detail in the portions of the book dealing with such matters as service and procedure in default. We still think that students might be given a somewhat fuller introduction to the routine of an undefended action, though as successive editions appear our criticism finds itself whittled down at various points. We welcome, for instance, the new passage on ensuring that the action is not premature. On the other hand, the important point is still not made clear (on p. 50) that acceptance of service sufficient to render personal service of a writ unnecessary is only constituted by a solicitor's written undertaking to accept service followed by appearance.

Hill and Redman's Law of Landlord and Tenant. Twelfth Edition. By W. J. WILLIAMS, B.A., of Lincoln's Inn, Barrister-at-Law, and Miss M. M. WELLS, M.A., of Gray's Inn, Barrister-at-Law. 1955. London: Butterworth & Co. (Publishers), Ltd. £5 17s. 6d. net.

Ever since Parliament, by enacting Pt. II of the Landlord and Tenant Act, 1927, began to modify common-law remedies as well as common-law rights (one can regard such modification in the case of rent control legislation as at least intended to be temporary!) the dividing of the subject of the Complete Law of Landlord and Tenant into two separate and self-contained Parts, the Common Law and Acts, has not worked too well; it meant either that the consequences of, say, breaches of a repairing covenant had to be sought in widely separated chapters, or that the book had to repeat itself. Consequently, the editors of the 12th edition of " Hill and Redman " have been wise to make a " slight alteration " in the arrangement, Pt. I now being " The General Law " and being followed by three others, dealing with Agricultural Tenancies, the Rent Acts, and Emergency Legislation respectively. The change may help us, *inter alia*, to bring home to a land agent the fact, not always appreciated, that the Agricultural Holdings Act, 1948, does not contain the whole of the law affecting landlords and tenants of farms.

The reputation for living up to its title is fully maintained by the new edition and the legislation which occasioned it, the Housing Repairs and Rents Act, 1954, and the Landlord and Tenant Act, 1954, are satisfactorily expounded in their proper places. If there be any omission which can be regretted it would be the omission to mention the decision in *Taylor* v. *Beal* (1591), Cro. Eliz. 222—we are from time to time reminded that authority is not lost by age—in connection with tenants' remedies for landlords' breaches of repairing covenants.

And, while this is not a novel feature, we think it right to draw attention to the special chapter devoted to " The Preparation and Perusal of Draft Leases " which makes " Hill and Redman " so useful a book to keep handy.

The Practice of Price Maintenance with particular reference to the Motor Industry. By K. C. JOHNSON-DAVIES, M.A. (Cantab.), T.D., Barrister-at-Law. 1955. London: Iliffe and Sons, Ltd. 15s. net.

We have recently ventilated a difference of opinion with the author of this book, and published his reply in our correspondence columns at 99 SOL. J. 922. The present book is much in point on the subject, with its chapter on Domestic Tribunals and its insistence on the precautions taken by that for the Motor Industry (with particular reference to which the book is written) to ensure fairness in all its proceedings. This present review is certainly not the place to continue the disputation, and, in any case, we neither challenged that fairness nor at any time held any brief for the pirates of the trade whose machinations may result in their being called before a tribunal set up under " somebody else's rules."

Moreover, it is meet that the reviewer should pay his small tribute to the master of a subject of topical importance. Besides fully describing the enforcement procedure of the B.M.T.A. and other associations, the author outlines the history of the body of which he is the secretary, justifies price maintenance as a protection for trade and in the interests of the public, demonstrates the impracticability of any but a collective form of enforcement, and details at considerable length the covenant scheme as developed in the post-war years. It is a factual study of great value.

Mr. Johnson-Davies' thesis brings him into variance, at some points, with the majority report of the Monopolies Commission on Collective Discrimination, and he devotes a chapter to forthright comment on the conclusions in that report. Elsewhere, he advocates the statutory recognition of trade tribunals subject to surveillance by the courts. An important point that he repeatedly makes is that a trade association is prohibited from enforcing its trading rules in the ordinary courts. There is clearly much room for rationalising the law of trade associations even after *Bonsor's* case.

Employers' Liability at Common Law. Third Edition. By JOHN MUNKMAN, LL.B., of the Middle Temple and North-eastern Circuit, Barrister-at-Law. 1955. London: Butterworth & Co. (Publishers), Ltd. £1 15s. net.

A new edition of this well-known work has been rendered necessary by the growth of case law on the liability of employers. Recent legislation, such as the Mines and Quarries Act, 1954, has also affected the position. The chapters on the personal duty of the employer, on the fencing of machinery and on coal mines have been re-written. The chapter on building operations has been revised and enlarged. A new chapter on iron and steel foundries has been added. Appendix I contains a glossary of legal terms, and Appendix IV sets out a useful list of the amounts awarded for injuries of various types. The Table of Cases and Table of Statutes are both lengthy and are an indication of the thorough manner in which the subject has been discussed.

NOTES OF CASES

These Notes of Cases are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible, the appropriate page reference is given at the end of the note.

Judicial Committee of the Privy Council

WEST AFRICA (GOLD COAST): LAND DISPUTE: CONCURRENT JURISDICTION OF SUPREME COURT AND NATIVE COURT: CONSENT ORDER: EXECUTION

Anima *v.* Ahyeye (substituted for Dwaa, deceased)

Lord Radcliffe, Lord Tucker, Mr. L. M. D. de Silva

13th December, 1955

Appeal from the West African Court of Appeal.

The respondent instituted the action out of which this appeal arose in the Divisional Court at Kumasi against the appellant and three others for declaration of title to a house and for £120 damages "for wrongful sale, trespass, use and occupation." The action was settled on terms embodied in a minute headed "Court notes of compromise and order thereon," which concluded "Judgment accordingly" and was signed by the judge. The respondent applied to issue execution against the appellant on that consent order. The appellant contended, *inter alia*, (1) that under s. 7 and Sched. I of the Native Courts (Ashanti) Ordinance, a Native Court B had jurisdiction over the subject-matter of the case and that consequently the Divisional Court had had no jurisdiction to make the consent order, and (2) that the minute was the record of a compromise agreement upon which proceedings were stayed and not a judgment on which execution could issue. The Supreme Court of the Gold Coast by a judgment, which was affirmed by the West African Court of Appeal, had directed the issue of execution on the consent order.

Mr. L. M. D. DE SILVA, giving the judgment, said that the effect of s. 14 of the Courts Ordinance of the Gold Coast was to confer on the Supreme Court a wide jurisdiction concurrent with the Native Courts over matters in which the Native Courts had jurisdiction. Section 17 (*b*) required the Supreme Court not to exercise that concurrent jurisdiction when s. 35 of the Native Courts (Ashanti) Ordinance came into operation, but the concurrent jurisdiction of the Supreme Court was ousted by the operation of s. 35 whenever, and only "whenever it shall appear to the Divisional Court that any civil cause or matter is one properly cognisable by a Native Court and that a Native Court with jurisdiction to try such civil cause or matter has been established" (s. 35). The court might of its own motion, at any stage of the action before judgment, upon the material placed before it by the parties for purposes other than those of ousting jurisdiction, with or without further material elicited by itself, come to the conclusion that the requisite circumstances existed. It would then be its duty to stop proceedings and refer the parties to the Native Court. It was also open to a party for the purpose of ousting jurisdiction to endeavour to make it appear to the court upon the material before it at any stage, or by placing further material before it, that the requisite circumstances existed and to ask for a decision on the point thus raised. But once judgment was pronounced without the question of ouster of jurisdiction being considered or submitted for consideration, the judgment would be the judgment of a competent court. Accordingly, assuming that this was a case in which the Native Court B had jurisdiction, neither party had endeavoured to oust the jurisdiction of the Supreme Court by bringing the requisite circumstances, if they existed, to the notice of that court, and its judgment was therefore the judgment of a court of competent jurisdiction. The minute was a minute of a judgment on which execution could issue. The combined effect of the terms and the order was to make the obligations of parties in each of the terms of settlement enforceable by execution unconditionally, that was, enforceable against each of them by execution whether or not the obligations of other parties in other terms had been fulfilled. Further, the court had no jurisdiction subsequently to review the consent order. The words "judgment or decision given by him" in Ord. 41 in Sched. III to the Courts Ordinance, which dealt with the power of a court to review a judgment, referred to a judgment or decision of a court for reasons stated, and while a consent judgment or order might in appropriate proceedings be set aside on a ground such as fraud, it could not be reviewed under Ord. 41. The court had, under Ord. 43, r. 26, a discretion whether to allow or refuse an application for execution of a judgment after the expiration of six years (the period relevant here), and in the present case there was nothing to show that that discretion had been exercised unjudicially. The appeal would be dismissed. The appellant would pay the respondent the costs of this appeal.

APPEARANCES: *Gilbert Dold* and *J. R. Bisschop* (*A. L. Bryden and Williams*); *Ralph Millner* (*T. L. Wilson & Co.*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[2 W.L.R. 229**

CRIMINAL LAW: CONSPIRACY TO ACCUSE OF CRIME: PROOF OF FALSITY OF BELIEF

Conteh and Others *v.* R.

Lord Oaksey, Lord Tucker and Lord Somervell of Harrow

11th January, 1956

This was an appeal against a decision of the Supreme Court of Sierra Leone finding the appellants guilty of a conspiracy to accuse Paramount Chief Alfred Bockari Samba and others of having committed murder. The proceedings against the appellants were a sequel to an unsuccessful prosecution for murder. On 9th May, 1953, the dead body of a man called Fogundia was found within the chiefdom of Samba. On the sworn information of two of the present appellants four persons were charged with the murder. It was said that Samba was a cannibal and had directed the four to murder Fogundia. It was not clear why Samba, who was arrested, was not charged. That story was supported by one of the then accused until the trial. He then retracted and said that he had been bribed to give false testimony by the appellants, who wanted Samba's removal. The present appellants supported the prosecution, but the accused were acquitted. These proceedings then followed, Samba being the principal complainant. At the beginning of the trial of the appellants they objected to one of the two assessors on the ground that he was married to the daughter of the chief complainant Samba, and that it would not be fair for him to sit on the case. The judge ruled that the objection was misconceived on the ground that there was nothing in the Courts Ordinance, c. 50, which gave a right to object to an assessor's sitting on a case. The appellants, who had pleaded not guilty, having been convicted and sentenced to varying terms of imprisonment with hard labour, now appealed, by special leave.

LORD SOMERVELL OF HARROW, giving the judgment allowing the appeal, said that the gist of the offence charged was that the accusation should be false to the knowledge of those conspiring. The first submission for the appellants was that the trial judge failed to state clearly or at all the necessity of the prosecution establishing that the accused knew the accusation to be false. It was true that in the course of his summing up the judge referred to evidence which, if believed, would support an agreement falsely to accuse; but nowhere was there a reference to the necessity of proving the falsity of the belief. Their lordships were of opinion that the appeal succeeded on that ground. With regard to the objection to the assessor, notwithstanding the silence of the Ordinance, their lordships were clear that the objection was not misconceived. Either party, the Crown or the accused, was entitled to raise an objection to an assessor on the ground that he was interested in or connected with the subject-matter of the proceedings or those concerned so that it was undesirable for him to sit as an assessor. It would then be for the judge to rule on the objection in his discretion. Counsel for the appellants contended that, the appeal having been allowed, the appellants ought to be allowed their costs, but their lordships did not think that the circumstances of the case justified a departure from the general rule and there would therefore be no order as to costs.

APPEARANCES: *Dingle Foot*, Q.C. and *R. K. Handoo* (*T. L. Wilson & Co.*); *J. G. Le Quesne* for the Crown as *amicus curiae*, the Crown not seeking to support the conviction, but to contest the grant of costs (*Charles Russell & Co.*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[2 W.L.R. 227**

House of Lords

NEGLIGENCE: UNLOADING SHIP: INJURY TO STEVEDORE'S LABOURER

Thomson *v.* Cremin and Others

Viscount Simon, L.C., Lord Thankerton, Lord Wright, Lord Romer and Lord Porter. 20th October, 1941

Appeal from the Second Division of the Court of Session.

A labourer (the first respondent) employed by a firm of Glasgow stevedores (the second respondents) in discharging bulk grain in a ship's hold was injured when he was struck by the fall of a shore fixed by shipwrights in Australia to hold a shifting-board and certified as satisfying Australian Government regulations. The labourer sued the shipowner (the appellant) and the stevedores for damages for negligence. The Second Division of the Court of Session held that the shipowner alone was liable. He appealed to the House of Lords.

VISCOUNT SIMON, L.C., said that the appeal should be dismissed. The shipowner had argued that (*a*) the shore was securely fixed in Australia, and (*b*) the fall was due to the negligence of the second respondents in discharging the cargo. The erection of the shifting-boards and the fitting of the shores were required by Australian law. The appellant contended that compliance with the regulations was the full extent of the shipowner's duty. This was not so. The regulations were for the purpose of securing that ship and cargo could safely face the dangers of the voyage but the shipowners had undertaken not only to carry the cargo to its distination but to unload it there and they must have contemplated that stevedores would be employed for the purpose. The shipowner was the occupier and the labourer an invitee. The shipowner's responsibility for the safety of the structure was not absolute, but he owed the invitee a duty to take adequate care. If adequate care was not exercised in fitting and securing the shore it was no answer to say that the shipowner employed an independent contractor in Australia to do the work. The first question was whether the fixing of the shore was done with adequate care. That depended on whether the "chock" holding the shore was fastened with nails of adequate length. The court concluded that short nails were employed and the House should not set aside this finding. The shipowner made allegations of fault against the stevedores. But it was not part of the regular practice or course of duty of stevedoring firms to inspect shores, though if they observed a shore to be loose it would be their duty to take precautions, but this shore before its fall gave no appearance of being dangerous. The shipowner alone was liable for the accident.

The other noble and learned lords agreed.

Appeal dismissed.

APPEARANCES: *Duffes*, K.C., and *George Reid* (*Thomas Cooper and Co.*, for *Boyd, Jameson & Young*, W.S., Edinburgh); *John Wheatley* and *G. G. Stott* (*Landons*, for *Thomas J. Addly*, S.S.C., Edinburgh, and *William Thornton*, Glasgow); *Thomson*, K.C., and *J. H. Bassett* (*Lawrence Jones & Co.*, for *Macpherson and MacKay*, W.S., Edinburgh, and *Niven, Macniven & Co.*, Glasgow).

[Reported by F. H. COWPER, Esq., Barrister-at-Law] [1 W.L.R. 103

Court of Appeal

LABOUR BOARD: DELEGATION OF DISCIPLINARY POWERS TO COMMITTEE OF LOCAL BOARD: WHETHER ULTRA VIRES

Vine *v.* National Dock Labour Board

Singleton, Jenkins and Parker, L.JJ. 30th November, 1955

Appeal from Ormerod, J.

The plaintiff was a dock labourer employed in the reserve pool by the National Dock Labour Board under the scheme set up by the Dock Workers (Regulation of Employment) Order, 1947. On 29th October, 1952, the plaintiff was allocated work with a company of stevedores, but failed to report to them, and the company lodged a complaint with the National Dock Labour Board. The complaint was heard by a disciplinary committee appointed by the local dock labour board who found the complaint true and, purporting to act under cl. 16 (2) (*c*) of the Order of 1947, gave the plaintiff seven days' notice to terminate his employment with the National Dock Labour Board. The plaintiff's appeal to an appeal tribunal set up under the scheme was dismissed. In proceedings in the High Court the plaintiff sought both damages and a declaration that his purported dismissal was illegal, *ultra vires* and invalid. Ormerod, J., awarded the plaintiff £250 damages and a declaration that the action of the board was *ultra vires* or invalid. The board appealed.

SINGLETON, L.J., said that it was decided in *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18 that the powers given to the local labour board were of a judicial or quasi judicial character and the local board could not delegate their powers. In the present case the delegation was to two members of a disciplinary committee. It was pointed out to the trial judge that there was no power to delegate those powers to the disciplinary committee; it was the duty of the local board to exercise them itself. Ormerod, J., followed the decision in *Barnard's* case, and held that that delegation was wrong and that, there having been no decision of the local board, the whole proceeding was null and void; he held further that, though there was an appeal to the appeal committee, the effect of the appeal could not make anything out of that which was nothing. Thus he decided in favour of the plaintiff. It appeared to him (his lordship) that that was right upon the decision in *Barnard's* case. It would be of great convenience if the local board, who had many duties, were able to delegate certain questions to some of their members, but by doing that which they did in this case they excluded those members who were not nominated to sit from sitting. If there was a disciplinary proceeding under cl. 16 it must be according to the terms of the scheme, and if, by reason of delegation, other members were excluded from sitting upon the local board, there was no decision of the local board. As to the nature of the remedy, he (his lordship) was of the opinion that the wrong done to the plaintiff could be sufficiently compensated by an award of damages, and that a declaration ought not to have been granted in the circumstances.

JENKINS, L.J., while agreeing that the plaintiff's purported dismissal was illegal, *ultra vires* and invalid, was of the opinion that the judge was also right in granting a declaration to that effect.

PARKER, L.J., agreed with Singleton, L.J. Appeal dismissed.

APPEARANCES: *Harold Brown*, Q.C., and *G. W. Willett* (*Bell, Brodrick & Gray*); *Phineas Quass*, Q.C., and *T. O. Kellock* (*White & Leonard*, for *Wells & Woodford*, Southampton).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [2 W.L.R. 311

RENT RESTRICTION: REPAIRS INCREASE UNDER ACT OF 1954: OBLIGATION TO GIVE FULL DETAILS OF COMPUTATION: EFFECT OF ELECTION UNDER ACT OF 1954 ON REPAIRS INCREASE UNDER ACT OF 1920

Jackson and Another *v.* Croucher

Evershed, M.R., Birkett and Romer, L.JJ. 16th December, 1955

Appeal from Wandsworth County Court.

A statutory tenant refused to comply with a notice of an increase of rent to be made under the provisions of the Housing Repairs and Rents Act, 1954. The first ground of objection was that the notice, though made on the form prescribed by the Housing Repairs (Increase of Rent) Regulations, 1954 (S.I. 1954 No. 1036), known as Form RR.3, was invalid because the form had not been fully completed, the landlords having omitted to state the deduction, if any, from the maximum increase which would be required to ensure that the recoverable rent (less the amount of the rates payable by the landlords) did not exceed twice the gross value of the premises. It was not disputed that no deduction was required. Secondly, the tenant contended that service of a notice of election under s. 30 (3) of the Act of 1954 (on the form known as Form RR. 4A) had the effect of reducing not only the maximum amount of the repairs increase which was permitted by s. 23 of that Act, but also the amount of the repairs increase permitted under s. 2 (1) (*d*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, having regard to a statement made on the prescribed form of notice that the effect of the election would be that the landlords would be entitled to a smaller repairs increase, but would not be responsible for keeping the interior of the premises in good decorative repair. The county court judge gave judgment for the landlords and the tenant appealed.

EVERSHED, M.R., said that although s. 25 (3) of the Act of 1954 emphasised that full information should be given to the tenant of the way in which a repairs increase had been calculated, the omission of part of the calculation in the present case was innocuous for the tenant was, or should have been, well aware of what the figures were. In exercise of the discretionary powers conferred on the court by s. 25 (4) of the Act of 1954 the landlords should be permitted to amend the notice, which should then take effect as from the date on which it was originally served. The effect of election under s. 30 (3) of the Act of 1954 was to limit the repairs increase permitted under that Act. For that purpose it had to be made plain on the form of notice that the landlords repudiated responsibility for internal decoration as a matter of obligation, but as the tenant was not under any express liability to do repair by the terms of s. 30 (1), the landlords were, for the purposes of s. 2 (1) (*d*) of the Act of 1920, still to be deemed as between themselves and the tenant wholly responsible. Therefore, the increase of rent permitted under that provision was unaffected by the election.

BIRKETT, L.J., and ROMER, L.J., agreed. Appeal dismissed.

APPEARANCES: *D. Turner-Samuels* (*Garber, Vowles & Co.*); *G. Dobry* (*Frank Taylor, Nightingale & Baker*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [2 W.L.R. 331

LANDLORDS' EXPRESS COVENANT FOR QUIET ENJOYMENT: EXCLUSION BY THIRD PARTY: WHETHER IMPLIED COVENANT TO PUT TENANT INTO POSSESSION

Miller *v.* Emcer Products, Ltd.

Evershed, M.R., Birkett and Romer, L.JJ. 20th December, 1955

Appeal from Danckwerts, J.

Landlords demised premises to a tenant together with the right to use two lavatories on upper floors which were occupied by a third party. The grant contained a covenant for quiet enjoyment of the demised premises binding the landlords or the superior landlords or any person rightfully claiming under or in trust for them. The tenant was prevented by the third party from exercising his right to use one of the lavatories and he sued his landlords, alleging a breach of an implied covenant that they had a good title to convey to him the right to use the lavatories, and, alternatively, a breach of an implied covenant that they would put him into possession of the right demised to him. The third party held under a title paramount to the landlords in question. Danckwerts, J., dismissed the tenant's action, and he now appealed.

EVERSHED, M.R., and BIRKETT, L.J., agreed with the judgment read by Romer, L.J.

ROMER, L.J., said that the right which the landlords had purported to grant was a legal easement and was part of the demised premises to which the covenant for quiet enjoyment contained in the underlease related. In *Coe* v. *Clay* (1829), 5 Bing. 440, and *Jinks* v. *Edwards* (1856), 11 Ex. 775, an obligation was implied from the relationship of landlord and tenant to put the tenant into possession of the premises, but apart from other considerations it was doubtful whether such an obligation could be applicable to the grant of an easement to use accommodation in common with others. In the present case the tenant was put into possession of all that part of the subject-matter of the grant of which he was entitled to exclusive possession. There would have been implicit in the formal devise a covenant for title and for quiet enjoyment had it not been excluded by the express covenant for quiet enjoyment (see *Line* v. *Stephenson* (1838), 4 Bing. N.C. 678, and (1838), 5 Bing. N.C. 183). That implied covenant extended to putting the tenant into possession of the premises leased to him at the outset of his term as well as entitling him to remain in possession thereafter (see *Ludwell* v. *Newman* (1795), 6 T.R. 458). Consequently in a formal demise it was unnecessary to imply a separate obligation from the relationship of landlord and tenant to put the tenant in possession, as was done in *Coe* v. *Clay* and *Jinx* v. *Edwards* in the absence of a formal demise. If, however, such an obligation could and should be implied in a formal demise, it would be *in pari materia* with the implied covenant that the tenant should remain in possession thereafter, and it would, therefore, be eliminated by an express covenant for quiet enjoyment, such as that in the underlease in the present case. In so far as the decisions in *Coe* v. *Clay*, *Jinx* v. *Edwards* and *Wallis* v. *Hands* [1893] 2 Ch. 75 depended on the view that a covenant for quiet enjoyment could not be exercised before actual entry, they had been overruled, in effect, by s. 149 (2) of the Law of Property Act, 1925. Appeal dismissed.

APPEARANCES: *J. A. Plowman*, Q.C., and *H. E. Francis* (*J. G. Bosman, Robinson & Co.*); *J. G. Strangman*, Q.C., and *Denis S. Chetwood* (*Herbert Smith & Co.*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [2 W.L.R. 267

Queen's Bench Division

NEGLIGENCE: MINE: FALL OF ROOF: CONTRACTORS' WORKMAN INJURED: ROOF SUPPORT UNDER COAL BOARD INSTRUCTIONS: LIABILITY OF CONTRACTORS

Szumczyk *v.* Associated Tunnelling Co., Ltd., and Another

Ashworth, J. 17th November, 1955

Action.

The plaintiff's employers, A. T. C., were engaged under contract with the National Coal Board, the occupiers of a mine, in constructing a tunnel in the mine when some controversy arose as to the manner in which the roof should be supported. The supervisor of A. T. C. wished to employ a system of support which he was prohibited from using by the officials of the Board, who laid down a system of support which was less adequate. The controversy was reported to a senior official of A. T. C., who conveyed the substance of it to a senior official of the Board, as a result of which nothing further was done and the plaintiff, although he complained to his superiors, was instructed to carry on with the system of support laid down by the officials of the Board. While so working the plaintiff sustained injuries by a fall of the roof, which was due to its being, in breach of the statutory duty imposed on the Board, insufficiently supported. The plaintiff brought an action against his employers claiming damages for negligence in failing to provide a safe system of work, and against the Board claiming damages for negligence and breach of duty under the Coal Mines Act, 1911.

ASHWORTH, J., said that it was plain that there must be judgment against the Coal Board. As against the employers, the plaintiff contended that they could not escape from their liability to take reasonable care by saying that they relied on the Coal Board; he relied on observations in *Thomson* v. *Cremin* [1956] 1 W.L.R. 103; p. 73, *ante*, to the effect that a master stevedore, if he observed anything defective about the ship on which his men were working, owed a duty to take reasonable measures for their protection. But the employers' duty to take reasonable care was not absolute, and there were passages in *Thomson* v. *Cremin*, *supra*, which were favourable to the employers. They were aware that the Coal Board were under a statutory duty to support the roof, and that there was a controversy as to the manner of support. They reported the controversy; they knew that the Coal Board were experts, and even though the method proved wrong it would be right to hold that they were not in breach of their duty to the plaintiff in what they did. The Coal Board, who were under a statutory duty, had insisted on their own method being employed.

Judgment for the first defendants.

Judgment against the second defendants.

APPEARANCES: *J. S. Watson*, Q.C., and *G. Bean* (*Canter, Levin & Mannheim*, Liverpool); *D. J. Brabin*, Q.C., and *J. M. Davies* (*Weightman, Pedder & Co.*, Liverpool); *J. D. R. Crichton*, Q.C., and *L. S. Rigg* (*P. E. Lissant*, Manchester).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 98

FOREIGN TRIBUNALS EVIDENCE ACT, 1856: POWER TO ORDER PRODUCTION OF DOCUMENTS: DISCOVERY AGAINST PERSONS NOT PARTIES TO FOREIGN SUIT

Radio Corporation of America *v.* Rauland Corporation and Another

Barry, J. 21st December, 1955

Appeals from Master Burnand.

Two American corporations, the defendants in an action brought in the United States by another American corporation for infringement of patents, alleged by way of defence and cross-claim a conspiracy between the plaintiff corporation and other American

foreign and English corporations to violate the anti-trust laws of the United States by an arrangement to pool a large number of patents connected with the electronics industry and, by means of licensing and cross-licensing agreements, to parcel out among the alleged conspirators exclusive trading rights in various parts of the globe. The defendant corporations obtained from the United States court letters rogatory which asked that a large number of named witnesses, all of whom were members of the boards of two English companies, not parties to the suit in the United States, and "such officers or agents" of those two and two other English companies "as may have custody or possession of documentary evidence material to the issues in the . . . proceedings" should be caused to appear before the United States consul in London to give evidence on oath and to produce such documentary evidence in their custody or possession as "is relevant to the issues pending in the suit." Pursuant to the letters rogatory the American corporations sought an order under the Foreign Tribunals Evidence Act, 1856, in respect of the named witnesses and the officers or agents of the companies requiring them to give evidence and to produce a number of specified documents and agreements and that the examination should refer to "the conversation, transactions, activities and negotiations" referred to in the agreements and documents produced, and also to produce all letters and other documents showing "the steps in the negotiations which led up to each of the agreements mentioned" and "all documents mentioned" in any of the documents produced. Both English companies now appealed from an order made by Master Burnand in favour of the American corporations.

Application for the discharge of an order made by Slade, J.

The applicant became a director of one of the English companies in February, 1955. He was not one of the witnesses named in the letters rogatory, but evidence obtained by the American corporations showed that he might have some knowledge of facts relevant to the issues in the action in the United States. On an *ex parte* application by the American corporations Slade, J., made an order under the Foreign Tribunals Evidence Act, 1856, that he attend before the United States consul and be examined on oath or affirmation. The applicant applied for the discharge of this order. The appeals and the application were heard in chambers and were adjourned into open court for judgment.

BARRY, J., said that he was not prepared to hold that persons or corporations within the jurisdiction of the English courts should be subjected to a wider form of inquisition in relation to an action pending in a foreign court than that to which they would be liable if the action were being tried in Scotland or in Northern Ireland or in this country. Applying the principles enunciated in *Burchard* v. *Macfarlane* [1891] 2 Q.B. 241, decided under the Evidence by Commission Act, 1843, the correct interpretation of s. 1 of the Act of 1856 was that any order requiring the production of documents was ancillary to the order for the examination of witnesses, and any order made upon "such officers or agents" of the companies "as may have custody or possession of documentary evidence material to the issues" in the United States action was outside the jurisdiction of the court and bad. Under the Act of 1856 the court had no power to order what was, in effect, discovery against a witness or to call him merely to obtain discovery or to examine him upon the documents which might be in his possession or control. If he, his lordship, were wrong in his view as to jurisdiction he was satisfied that, as a matter of discretion, the order so far as it related to the disclosure of documents relating to the "steps in the negotiations of any of the agreements" or "documents mentioned" in any of the documents could not be supported. The endorsement of such an order against any company or person not a party to the action would be oppressive when judged by the standards of our own civil procedure, and he did not propose to judge it by any other standards. The position as to the witnesses named in the letters rogatory was different, and the court's discretion in that respect was unfettered. It would be oppressive to order the attendance of all the persons named but it would be wrong to refuse to make an order which would enable relevant facts to be proved by parole evidence in this country. His lordship named certain persons who, on the evidence, might have some knowledge of the matters in issue in the American action, and ordered that they attend for examination and produce certain specified and identified documents. Turning to the application his lordship said that, on its true construction, s. 1 of the Act applied only to a witness whose testimony the foreign court had expressed a desire to obtain. That expression of desire might be proved by various means, but it must relate to a named witness or at least to a witness in a named class. Although the evidence already elicited showed that the applicant might have some knowledge of some relevant facts, the American court had not desired his evidence, and he would be discharged from compliance with the order. Appeals allowed in part. Application allowed.

APPEARANCES: *Sir Frank Soskice*, Q.C., and *J. F. Le Quesne* (*Theodore Goddard & Co.*); *Sir Hartley Shawcross*, Q.C., and *R. J. Parker* (*Linklaters & Paines*); *Kenneth Diplock*, Q.C., and *A. L. Figgis* (*Herbert Smith & Co.*).

[Reported by Miss J. F. LAMB, Barrister-at-Law] [2 W.L.R. 281

Probate, Divorce and Admiralty Division

DIVORCE: SEPARATION AGREEMENT: COVENANT NOT TO INSTITUTE PROCEEDINGS FOR RESTITUTION OF CONJUGAL RIGHTS "OR OTHERWISE"

Keeble *v.* Keeble

Mr. Commissioner Latey, Q.C. 7th December, 1955

Husband's defended petition for divorce on ground of cruelty.

The parties were married in 1926. As a result of the wife's alleged conduct dating from 1938, which was eventually the basis of the charge of cruelty, the husband left home in July, 1953, and consulted solicitors. Correspondence then ensued between the husband's solicitors and those consulted by the wife in which no allegations of cruelty nor any other form of matrimonial misconduct were made against the wife. On 1st August, 1953, the parties entered into a separation agreement by which, in cl. 1, they agreed that "the husband and the wife shall live and continue to live separate and apart from each other and neither shall molest, annoy or interfere with each other or institute any proceedings for restitution of conjugal rights or otherwise." By cl. 2 it was agreed that the husband should pay to the wife for life a sum of £3 a week net, but that such sum "shall cease to be payable if the marriage between the husband and the wife shall be dissolved by a final or absolute decree of a court of competent jurisdiction." Clause 10 of the agreement provided that the agreement should cease to have effect on a resumption of cohabitation. The agreement made no allegation of misconduct against the wife. The husband, in his evidence in the divorce suit, said that at the time of entering into the agreement all that he had in his mind was to get away from a position which had become intolerable to him. On 3rd March, 1955, the husband filed his petition praying for a dissolution of the marriage on the ground of cruelty; the wife, by her answer, denied the allegations of cruelty. At the hearing of the petition counsel for the wife submitted that the words "or otherwise" contained in cl. 1 of the agreement of 1st August, 1953, were a bar to the proceedings.

Mr. Commissioner LATEY, Q.C., said that the *ejusdem generis* principle must be applied to the words "or otherwise." As the whole purpose of the agreement was to separate the parties on terms which excluded any reference to misconduct, those words meant that neither by a process for restitution of conjugal rights nor in any other possible way could legal steps be taken by either party to compel the other to come together. The very much wider meaning sought to be put upon them was excluded by the fact that the possibility of a future divorce had been taken into consideration in the agreement, and the words, therefore, constituted no bar to proceedings for divorce.

The hearing then proceeded; and the husband was granted a decree *nisi*. Order accordingly.

APPEARANCES: *R. Castle-Miller* (*Theodore Goddard & Co.*); *A. E. Bolton* (*H. B. Wedlake, Saint & Co.*).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] [1 W.L.R. 94

PROBATE: ADMINISTRATION: FOREIGN ADOPTION: ENGLISH DOMICILE ACQUIRED: ADOPTED PERSON'S DEATH INTESTATE

***In re* Wilby, deceased**

Barnard, J. 14th December, 1955

Summons.

The deceased was born in Burma in 1924, and was adopted by the applicant and her husband in 1926 in accordance with

the law of Burma. At that time all three were domiciled in Burma, but the adoptive parents came to England in 1933, where they were joined by the deceased in 1935, and they all acquired a domicile of choice in this country. Although the deceased, who died in 1954, had executed a testamentary document in May, 1954, that document was not properly executed in accordance with the Wills Act, 1837, and the deceased died intestate, a spinster, leaving personal estate of some £568 gross. The applicant, by then a widow, applied for a grant of letters of administration as the lawful mother by adoption. The deceased's lawful brother and sister consented to the application. *Cur. adv. vult.*

BARNARD, J., said that as the deceased had died intestate, domiciled in England, the law governing succession was English law. He referred to s. 13 (1) of the Adoption Act, 1950, whereby on an intestacy the property of an adopted person devolves as if the adopted person were the child of the adopter born in lawful wedlock, and to *In re Wilson* [1954] Ch. 733, and said that although the adoption in the present case would, no doubt, be recognised for some purposes, it did not entitle the adoptive mother to succeed to the deceased's estate; for if he were to accede to the application, it would have to be on the basis that the English courts recognised any such foreign adoption for the purpose of succession, and it would be impossible for a judge to have to grant or refuse an application according to how closely the foreign law of adoption approximated to our own. In his (his lordship's) opinion, the Administration of Estates Act, 1925, as amended by the Adoption Act, 1950, must be construed strictly, and the adoption orders referred to in the Act were orders made in this country, in Scotland and in Northern Ireland. Summons dismissed.

APPEARANCES: *M. E. F. Corley* (*Pedley, May and Fletcher*).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] [2 W.L.R. 262

IN WESTMINSTER AND WHITEHALL

STATUTORY INSTRUMENTS

Act of Sederunt (Rules of Court Amendment No. 4), 1955. (S.I. 1955 No. 2005 (S. 153).)

Dressmaking and Women's Light Clothing Wages Council (Scotland) Wages Regulation (Amendment) Order, 1956. (S.I. 1956 No. 35.) 5d.

Hat, Cap and Millinery Wages Council (Scotland) Wages Regulation (Amendment) Order, 1956. (S.I. 1956 No. 36.) 6d.

London Traffic (Prescribed Routes) (Lambeth) Regulations, 1956. (S.I. 1956 No. 22.)

London Traffic (Prescribed Routes) (Tottenham) Regulations, 1956. (S.I. 1956 No. 28.)

Poultry Premises and Vehicles (Disinfection) Order, 1956. (S.I. 1956 No. 11.) 5d.

Purchase Tax (No. 1) Order, 1956. (S.I. 1956 No. 27.) 6d.

Retention of Cables and Pipes under Highways (North Riding of Yorkshire) (No. 1) Order, 1956. (S.I. 1956 No. 21.)

Retention of Cables, Mains and Pipes under and over Highways (Shropshire) (No. 2) Order, 1956. (S.I. 1956 No. 32.) 5d.

Stopping up of Highways (Cheshire) (No. 1) Order, 1956. (S.I. 1956 No. 29.)

Stopping up of Highways (Denbighshire) (No. 1) Order, 1956. (S.I. 1956 No. 19.)

Stopping up of Highways (Durham) (No. 1) Order, 1956. (S.I. 1956 No. 7.)

Stopping up of Highways (East Sussex) (No. 1) Order, 1956. (S.I. 1956 No. 17.)

Stopping up of Highways (Essex) (No. 1) Order, 1956. (S.I. 1956 No. 31.)

Stopping up of Highways (Essex) (No. 2) Order, 1956. (S.I. 1956 No. 13.)

Stopping up of Highways (Essex) (No. 3) Order, 1956. (S.I. 1956 No. 20.)

Stopping up of Highways (Gloucestershire) (No. 1) Order, 1956. (S.I. 1956 No. 33.)

Stopping up of Highways (Kent) (No. 2) Order, 1956. (S.I. 1956 No. 30.)

Stopping up of Highways (Northamptonshire) (No. 1) Order, 1956. (S.I. 1956 No. 18.)

Treasury (Loans to Local Authorities) (Interest) Minute, 1956. (S.I. 1956 No. 39.)

Treasury (Loans to Persons other than Local Authorities) (Interest) Minute, 1956. (S.I. 1956 No. 40.)

Truro Water Order, 1955. (S.I. 1955 No. 2006.) 6d.

Wild Birds (Oyster-Catchers) Order, 1956. (S.I. 1956 No. 25.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

At the annual general meeting of the DORSET LAW SOCIETY, held on 13th December, 1955, at the Antelope Hotel, Dorchester, the following appointments were made: President, Mr. E. N. G. Arkell; Senior Vice-President, Mr. R. E. Andrews; Junior Vice-President, Mr. T. S. Bartlett. New members of the Committee: Messrs. M. C. Green, L. B. Guest and P. F. Prideaux; Honorary Secretary, Mr. E. Stanley Smith.

In the next talk in the B.B.C.'s "Law in Action" series, on 5th February, C. J. Hamson, Professor of Comparative Law at Cambridge and Fellow of Trinity College, will deal with the question: "How far is a master responsible for the actions of his servant?"

A special university lecture in laws on "Parliamentary Control of Subordinate Legislation" will be given by Sir Cecil Carr, K.C.B., Q.C., LL.D., at the London School of Economics and Political Science, Houghton Street, Aldwych, W.C.2, at 5 p.m. on Tuesday, 14th February, 1956. The chair will be taken by Professor W. A. Robson, B.Sc. (Econ.), LL.M., Ph.D., Professor of Public Administration in the University of London. Admission will be free, without ticket.

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